

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Amendment of Part 90 of the)	PR Docket NO. 93-144
Commission's Rules to Facilitate)	RM-8117, RM-8030
Future Development of SMR Systems)	RM-8029
in the 800 MHz Frequency Band)	
)	
Implementation of Sections 3(n))	GN Docket No. 93-252
and 322 of the Communications Act)	
Regulatory Treatment of Mobile)	
Services)	
)	
Implementation of Section 309(j))	PP Docket No. 93-253
of the Communications Act --)	
Competitive Bidding)	

TO: The Commission

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CONSOLIDATED REPLY OF DIGITAL RADIO L.P.

Pursuant to the Federal Communications Commission's ("FCC" or "Commission") April 1, 1996 Public Notice,¹ Digital Radio, L.P. ("Digital Radio") hereby files this Consolidated Reply in support of its March 18, 1996 Petition for Reconsideration (the "Petition") of the First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making in the

¹ "Petition for Reconsideration and Clarification of Action in Rulemaking Proceedings," Public Notice, Report No. 2126 (released April 1, 1996). The Public Notice stated that oppositions are due within 15 days of publication of the public notice in the *Federal Register* and that replies are due 10 days after the time for filing oppositions has expired. Since the petitions for reconsideration were published in the April 12, 1996 *Federal Register*, oppositions were due on April 29, 1996 and this reply is due to be filed May 9, 1996.

above-captioned matter ("800 MHz Order").² The other petitions for reconsideration and comments that address the issue of slow growth implementation overwhelmingly support Digital Radio's claim that Commission elimination of five-year extended implementation authority for construction by incumbent licensees is unfair and unlawful.³

DISCUSSION

I. **Consensus Supports Retention of Five-Year Extended Implementation Authority For Incumbents.**

Digital Radio notes that several other petitions for reconsideration agreed with the position taken by Digital Radio in its Petition for Reconsideration that it is unfair to incumbent Specialized Mobile Radio ("SMR") licensees for the Commission to arbitrarily reduce existing extended implementation authority from 5 years to 2 years.⁴ These petitions support Digital Radio's position that eliminating extended implementation unfairly prevents incumbent SMR licensees from realizing returns on investments made in reliance on FCC rules and it disrupts

² First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making, PR Docket No. 93-144, GN Docket No. 93-252, PP Docket No. 93-253, FCC 95-501, paras. 110-112 (Dec. 15, 1995).

³ Digital Radio is responding to an Opposition to its Petition filed by Nextel Communications, Inc. ("Nextel") as well as to Comments filed by Small Business in Telecommunications in response to various petitions for reconsideration.

⁴ See, e.g., Petition for Clarification and Reconsideration filed by Idaho Communications Limited Partnership, et. al. (March 18, 1996) at 6, 9-10; Petition for Reconsideration filed by Industrial Communications and Electronics, Inc. (March 18, 1996).

settled business plans and property rights.⁵

In addition, nothing in the Opposition or Comments filed in this proceeding adequately responds to Digital Radio's concern that eliminating extended implementation will destroy the competitive balance in the SMR industry by driving many small to medium-sized SMR providers out of business. Smaller SMR providers lack the manpower and financial means to recover from the loss of three years' construction time to develop their wide area SMR systems and will be discouraged from making the additional investment necessary to prevail in the auctions for new Economic Area ("EA") licenses to further enhance their systems. By contrast, the largest, best funded SMR providers can make up for the loss of extended implementation authority by purchasing new EA licenses at auction.⁶ By squelching entry into the SMR marketplace by small and medium-sized providers, the 800 MHz Order undermines the goals of distributing licenses to a wide variety of applicants and of encouraging competition as set forth in the 1993 Budget Act and the 1996 Telecommunications Reform Act.⁷

II. If Extended Implementation Is Curtailed, Incumbents Should Be Free To Transfer Partially Constructed Facilities.

In an effort to protect incumbent SMR providers while also advancing spectrum auctions in the 800 MHz band, Digital Radio

⁵ Petition at 2-6.

⁶ Petition at 7-9.

⁷ Id.

proposed in its Petition that in the event the Commission elects to eliminate extended implementation, it allow incumbents who hold extended implementation grants to transfer their licenses and facilities (whether constructed or not) to potential applicants either before or after the auction for EA licenses.⁸ Such transfers would allow incumbents to realize some return on their investment in partially constructed facilities, while also helping potential EA licensees to meet their construction obligations in the licensed areas they receive at auction. Id.

On April 16, 1996, Nextel filed a consolidated opposition ("Nextel Opposition") to the petitions for reconsideration in this proceeding. While Nextel's Opposition attacked most of those petitions, Nextel agreed with Digital Radio's proposal to modify Section 90.609(b) of the Commission's rules and to allow transfer of unconstructed facilities licensed to incumbents with extended implementation authority. The Nextel Opposition called Digital Radio's proposal "constructive" and said it might offer "a smoother transition to wide-area SMR licensing."⁹ However, Nextel cautioned that relocation agreements should only be permitted between incumbents and the winning EA licensee -- not with "potential EA licensees."¹⁰

Contrary to Nextel's suggestion, relocating incumbents should be permitted to sell their constructed and unconstructed

⁸ Petition at 9-12.

⁹ Nextel Opposition at 15-16.

¹⁰ Id.

SMR authorizations to all auction applicants and "potential EA applicants" both before and after the EA auction. Such unlimited transfer of authorizations that are being relocated is the only fair way for the FCC to address the plight of incumbent SMR licensees facing a cutoff of their extended implementation schedules. To allow incumbents to transfer existing authorization only to the winners of the EA auction, as Nextel suggests, would force selling incumbents to negotiate with only one potential buyer -- the auction winner. This would disrupt market incentives and drastically reduce the seller's likely price and negotiating leverage.

Nextel's suggestion that incumbents be allowed to transfer partially constructed systems only to the EA auction winner advances Nextel's self-interest, not the public interest. The largest SMR providers, such as Nextel, are likely to be the highest bidders in the EA auctions proposed by the 800 MHz Order.¹¹ Allowing incumbents to transfer their systems only to the highest bidder would effectively leave incumbent licensees in the position of "waiting for Nextel to come shopping." See Comments filed by Small Business in Telecommunications (April 5, 1996) at 16. Such a situation would provide a windfall to the high bidder for the EA license because that high bidder could

¹¹ Petition at 8 (citing example of PCS auctions where largest entities won majority of auctioned spectrum in A and B blocks). See also David J. Lynch's article in the May 8, 1996 edition of USA Today, reporting that, out of the 255 bidders that began the recently concluded PCS C block auction, five bidders accounted for 80% of the dollars bid and 70% of the population covered by the licenses.

acquire partially constructed facilities at far less than fair market value by virtue of being the only eligible buyer for a system which the incumbent must sell. Because the public interest is not advanced by such unfair dealing and disruption of market incentives, the Commission should permit unrestricted transfer of existing authorizations to potential applicants for the EA auction.


CONCLUSION

For all of the above-stated reasons, Digital Radio respectfully requests that the Commission reconsider the 800 MHz Order's elimination of the extended implementation authority of incumbent SMR licensees.

Respectfully submitted,

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May 9, 1996

CERTIFICATE OF SERVICE

I, Melissa M. Fistner, an employee of Bennet & Bennet, PLLC, hereby certify that on this 9th day of May, 1996, I caused a copy of the attached Consolidated Reply of Digital Radio, L.P. to be served by hand delivery or first-class mail, postage prepaid to the following:

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